

EXPLANATORY STATEMENT

Issued by the Minister for Home Affairs

Migration Act 1958

Migration Amendment (Business Innovation and Investment Program Closure) Regulations 2024

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into and presence in Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

In addition, regulations may be made pursuant to the provisions mentioned in Attachment A.

The *Migration Amendment (Business Innovation and Investment Program Closure) Regulations 2024* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to close the Business Innovation and Investment Program (BIIP) to new visa applications. The Amendment Regulations reflect the Government's commitment to implement reforms set out in the Migration Strategy, and give effect to part of the measure *Migration System Reforms* in Budget Paper No. 2 of Budget 2024-25.

The BIIP was designed to attract investors, entrepreneurs and innovators. However, due to its poor fiscal performance and other means available to attract foreign investment into Australia, the Parkinson Review has recommended closing this program. The initial visa available to prospective applicants to the BIIP is the Subclass 188 (Business Innovation and Investment (Provisional)) visa, which provides a period of up to 5 years residence with the possibility of extension. Holders of the Subclass 188 visa may later transfer to the Subclass 888 (Business Innovation and Investment (Permanent)) visa should they meet the criteria.

The Amendment Regulations provide that Subclass 188 visa applications in the Business Innovation, Investor, Significant Investor, and Entrepreneur streams must be made before 31 July 2024. This has the effect of closing those streams to new applications. Existing applications for the Subclass 188 visa continue to be processed according to the settings which were in place before 31 July 2024. Related visa pathways would also be maintained:

- Applications can continue to be made in the Business Innovation Extension and Significant Investor Extension streams for current Subclass 188 visa holders in the Business Innovation or Significant Investor streams.
- Applications can also continue to be made by applicants seeking to satisfy the secondary criteria for the Subclass 188 visa – that is, members of the family unit of the 'primary' applicant who currently holds a Subclass 188 visa or is granted one further to an existing application.
- Subclass 188 visa holders, including those who are granted a visa further to an application made before 31 July 2024, can continue to apply for the permanent Subclass 888 visa.

The matters dealt with in the Amendment Regulations are appropriate for implementation in regulations rather than by parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed matters of visa criteria and visa conditions in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations.

The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to effectively manage the operation of Australia's visa program and respond quickly to emerging needs.

The Amendment Regulations amend the Migration Regulations, which are exempt from sunseting under table item 38A of section 12 of the *Legislation (Exemptions and other Matters) Regulations 2015*. The Migration Regulations are exempt from sunseting on the basis that the repeal and remaking of the Migration Regulations:

- is necessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs;
- would require complex and difficult to administer transitional provisions to ensure, amongst other things, the position of the many people who hold Australian visas, and similarly, there would likely be a significant impact on undecided visa and sponsorship applications; and
- would demand complicated and costly systems, training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of Legislation Act.

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of this Statement is at [Attachment B](#).

The Office of Impact Analysis (the OIA) has been consulted in relation to the amendments. No Impact Analysis is required. The OIA consultation reference number is OIA24-07084.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act).

Section 17 of the Legislation Act provides that the rule-maker must be satisfied that there has been undertaken any consultation that is appropriate and reasonably practicable before making a legislative instrument. The Department of the Prime Minister and Cabinet, the Department of the Treasury, the Department of Finance and Austrade were each consulted on the closure of the BIIP. The Government's decision to close the BIIP was also informed by the findings of the *Review of the Migration System* report, led by Dr Martin Parkinson AC PSM (the Migration Review), which noted that the Migration Review concluded the BIIP is delivering poor economic outcomes for Australia and recommended closing this program.

Closure of the BIIP was announced by the Minister for Home Affairs in a media release on 14 May 2024, as part of the Budget 2024-25 measure *Migration System Reforms*. Relevant State and Territory government counterparts have been notified of the Government's decision to close the

BIIP. The Department also published information in relation to the closure of the BIIP on its website on 12 June 2024,¹ including information for current visa applicants.

The Amendment Regulations commence the day after the instrument is registered on the Federal Register of Legislation.

Further details of the Regulations are set out in Attachment C.

The Migration Act specifies no conditions that need to be satisfied before the power to make the Amendment Regulations may be exercised.

¹ *Business Innovation and Investment Program (BIIP)*, 12 June 2024 - <https://immi.homeaffairs.gov.au/news-media/archive/article?itemId=1209>

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

In addition, the following provisions of the Migration Act are also relevant:

- subsection 31(3) of the Migration Act provides that the regulations may prescribe criteria for a visa or visas of a specified class;
- subsection 46(3) of the Migration Act provides that the regulations may prescribe criteria that must be satisfied for an application of a visa of a specified class to be a valid application.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Migration Amendment (Business Innovation and Investment Program Closure) Regulations 2024

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Disallowable Legislative Instrument

The *Migration Amendment (Business Innovation and Investment Program Closure) Regulations 2024* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to permanently close the Subclass 188 (Business Innovation and Investment (Provisional)) visa, in the initial Business Innovation, Investor, Significant Investor and Entrepreneur streams, with the effect that the Business Innovation and Investment Program (BIIP) is closed to new applications.

The BIIP was designed to attract investors and entrepreneurs to Australia. However, the Migration Strategy released on 11 December 2023, building on the findings of the ‘Review of the Migration System’ report, led by Dr Martin Parkinson AC PSM (the Migration Review), noted that the Migration Review concluded the BIIP is delivering poor economic outcomes for Australia and recommended closing this program. Studies including work by the Treasury and the Productivity Commission support this finding. As part of the Migration Strategy, the Government announced that it would not provide any new allocations for the BIIP while a new talent and innovation visa was considered.

The initial visa available to prospective applicants to the BIIP was the Subclass 188 (Business Innovation and Investment (Provisional)) visa, which provides for five years residence with the possibility for extension for holders of the Business Innovation and the Significant Investor streams. Holders of the Subclass 188 visa may later transfer to the Subclass 888 (Business Innovation and Investment (Permanent)) visa should they meet the criteria. This includes that they hold their Subclass 188 (Provisional) visa for at least three years, or four years for the investor streams.

The Amendment Regulations provide that Subclass 188 visa applications in the Business Innovation, Investor, Significant Investor, and Entrepreneur streams must be made before 31 July 2024. This has the effect of closing those streams to new applications. Existing applications lodged for the Subclass 188 visa will continue to be processed according to the settings which were in place before 31 July 2024. Related visa pathways are also maintained:

- Applications can continue to be made in the Business Innovation Extension and Significant Investor Extension streams for current Subclass 188 visa holders.
- Applications can also continue to be made by applicants seeking to satisfy the secondary criteria for the Subclass 188 visa – that is, members of the family unit of the ‘primary’

applicant who currently holds a Subclass 188 visa or is granted one further to an existing application.

- Subclass 188 visa holders, including those who are granted a visa further to an application made before 31 July 2024, can continue to apply for the permanent Subclass 888 visa.

These provisions ensure that Subclass 188 visa holders are able to remain until they qualify for the permanent Subclass 888 visa, and to allow them to bring their family members to Australia to join them.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- the right to work in Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
- rights relating to families and children, in particular those in Articles 17(1) and 23(1) of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 10(1) of the *Convention on the Rights of the Child* (CRC).

The right to work

Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) provides:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

While existing visa holders are able to continue working on their existing visa, the amendments made by the Amendment Regulations will result in some non-citizens who are in Australia, who may have been eligible for a Subclass 188 visa had they applied prior to the commencement of the amendments no longer being eligible. This may affect their ability to continue working in Australia.

Neither the ICCPR nor the ICESCR give a right for non-citizens to enter Australia for the purposes of seeking residence or employment. The UN Human Rights Committee, in its General Comment 15 on the position of aliens under the ICCPR, stated:

The [ICCPR] does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the [ICCPR] even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the [ICCPR].

As such, Australia is able to set requirements for the entry of non-citizens into Australia and conditions for their stay, and does so on the basis of reasonable and objective criteria. It is open to the Government to change visa settings for new applicants to meet its policy priorities for a well-managed migration program, consistently with its international obligations, that are intended to benefit the Australian community as a whole.

The amendments made by the Amendment Regulations have been implemented following reviews that included public consultation and stakeholder feedback. The amendments support the Migration Strategy intent to better identify migrants who drive Australia's long-term prosperity and drive growth in sectors of national importance by addressing deficits in the skilled migrant program, for the benefit of the Australian community.

The amendments do not affect current applicants or holders of the Subclass 188 visa, including those on a pathway from a provisional Subclass 188 visa to a permanent Subclass 888 visa.

The amendments do not affect a person's current rights on the visa that they hold and they may be able to apply for another visa appropriate to their circumstances, including other skilled visas, that would permit them to continue working or engaging in other business activities in Australia.

As such, while some non-citizens who had been intending to apply for a Subclass 188 visa are no longer able to do so, this does not limit their ability to pursue other visa options to remain in Australia for work purposes and the amendments do not unduly limit these rights.

Rights relating to families and children

Article 17(1) of the ICCPR provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 23(1) of the ICCPR provides:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 10 of the CRC provides:

[A]pplications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

The Subclass 188 visa allows members of a primary applicant's family unit to apply for, and be granted, the Subclass 188 visa at the same time as the primary applicant. In some cases this may not happen, for example if the family unit members intended to join the primary applicant in Australia later or where the family unit formed after the grant of the visa to the primary applicant – in such cases the family members could apply as 'subsequent entrant' applicants. The closure of the Subclass 188 visa to new applications will not impact the ability of family members to apply as subsequent entrant applicants for Subclass 188 visa holders.

Babies born in Australia to a Subclass 188 visa holder are not affected by the closure of Subclass 188 to new applications as they are granted a Subclass 188 visa by operation of law, if they do not acquire Australian citizenship through the other parent being an Australian citizen or permanent resident. For other family members, there may be range of options for the family to reunite or to maintain family unity in Australia, including other visas for those family members to enter or remain in Australia or through the Subclass 188 visa holder being able to travel back to visit or re-join their family.

As such, because of other options available to affected families, the closure of the Subclass 188 visa does not unduly limit rights relating to families and children.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to legitimate aims.

The Hon Clare O'Neil MP
Minister for Home Affairs

Details of the proposed *Migration Amendment (Business Investment and Innovation Program Closure) Regulations 2024*

Section 1 – Name of Regulations

This section provides the title of the Regulations as the *Migration Amendment (Business Innovation and Investment Program Closure) Regulations 2024* (the Amendment Regulations).

Section 2 - Commencement

This section provides for the Amendment Regulations to commence on the day after registration on the Federal Register of Legislation.

Subsection 2(1) provide that each provision of the Amendment Regulations specified in column 1 of the table would commence, or would be taken to commence, in accordance with column 2 of the table. Any other statement in column 2 has the effect according to its terms.

A note at the foot of the table under subsection 2(1) explains that the table would relate only to the provisions of the Amendment Regulations as originally made. The table will not be amended to deal with any later amendments to the Amendment Regulations.

Subsection 2(2) would provide that any information in column 3 of, the table is not be part of the Regulations. Information may be inserted in column 3, or information in it may be edited, in any published version of the Regulations.

Section 3 - Authority

This section provides that the Amendment Regulations are made under the *Migration Act 1958* (the Migration Act).

Section 4 - Schedules

This section provides for how the amendments in the Amendment Regulations operate, amending the *Migration Regulations 1994*.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – Subitems 1202B(4), (6), (6A) and (6D) of Schedule 1

This item inserts an additional item in the table under subitems 1202B(4), (6), (6A) and (6D) of Schedule 1 to the Migration Regulations, which relevantly sets out the requirements that must be met by a non-citizen seeking to make a valid application for each of the streams under the Subclass 188 (Business Innovation and Investment (Provisional)) visa. The additional item provides that the applicant must make the application before 31 July 2024. The effect of the amendment is to close off the visa to any new applications made on or after 31 July 2024.